No. 48903-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

DIANA GUARDADO
Respondent
v.

OTTO GUARDADO
Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAMANIA COUNTY

REPLY BRIEF OF APPELLANT

OTTO GUARDADO
Appellant
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I. ARGUMENT IN REPLY

A. THE STANDARD OF REVIEW

In her brief, Diana raises the claim for the first time that the procedures listed in CR 60(e) are ambiguous, and therefore should be interpreted in her favor. Br. Respondent at 7-8. Interpretation of court rules is de novo, in the same manner as statutes. *Gourley v. Gourley*, 158 Wash.2d 460, 466, 145 P.3d 1185 (2006). If the rule is plain, the courts give effect to that meaning. *Jafar v. Webb*, 177 Wash.2d 520,526, 303 P.3d 1042 (2013). In the event of ambiguity, the rule is read as a whole, harmonized with its provisions, and compared with similar rules to determine legislative intent. *Id* at 526-7. The courts do not search for ambiguity by "imagining a variety of alternative interpretations". *American Continental Ins. Co. v. Steen*, 151 Wash.2d 512, 518, 91 P.3d 864 (2004) (*citing W. Telepage, Inc. v. City of Tacoma*, 140 Wash.2d 599, 608, 998 P.2d 884 (2000)).

B. THE RESPONDENT'S ARGUMENTS DO NOT OVERCOME HER CR 60 VIOLATIONS, WHICH WERE NOT HARMLESS TO THE APPELLANT.

Diana claims that Otto waived his assignment to error because he did not cite an authority. Br. Respondent at 8. She relies on *Lodis v. Corbis Holdings, Inc.*, 192 Wash.App. 30, 64 n.17, 366 P.3d 1246 (2015) and *Skagit County Public Hosp. Dist. No. 1 v. State, Dept. of Revenue*, 158 Wash.App. 426, 440, 242 P.3d 909 (2010).

But this is not what *Lodis* or *Skagit* purports: "An appellant waives an assignment of error [by] fail[ing] to *present argument* ***or*** *citation to authority* in support of that assignment." *Lodis*, 192 Wash.App. at 64 n.17 (quoting *Skagit*, 158 Wash.App. at 440) (emphasis added). Otto did not waive this assignment of error – he argued that Diana did not perfect the requirements of CR 60(e)(1). Br. Appellant at 22-23.

She is correct that Otto did not cite any cases. An exhaustive search turned up no Washington cases where a litigant received relief in one cause number by filing a CR 60 motion in another cause number. Diana also did not cite any cases where a litigant "crossed over". Because she did not offer a citation, we can assume that she found no applicable cases as well. This narrow issue may be first impression for this Court.

Diana does not explain why this Court should overlook the CR 60(e)(2) requirement that the trial court "shall" enter an order establishing a later hearing with the opportunity for argument. Also missing is meritorious argument on why the court should forego the requirement that the affidavit, motion, and order "shall" be served upon Otto "before" the hearing date. CR 60(e)(3). Diana filed and presented it to Otto on the last day of trial, and the judge made his ruling that day. CP 256. The trial court erred when it exempted Diana from effectuating the procedures within CR 60.

She argues that Otto was on "full notice" that the court was considering CR 60(b)(11). Br. Respondent at 11. But the verbatim record shows that the court was broadly considering a modification of the divorce decree, and did not say

"CR 60" until both parties sat in court two weeks later. 4/14/16 RP at 85-86. The trial court asked the parties for authority in "modifying a divorce decree." *Id.* Since CR 60 is rarely used to modify a divorce decree, there was no way that Otto's attorney could have been certain this was under consideration. Luckily, (and in a broad, "shotgun" brief), she did manage to argue some points against the use of CR 60. CP 103-115. Otto's attorney argued that Diana did not have a cause of action required by RCW 4.72.050 to modify a decree and the action was almost frivolous. 2/26/16 RP at 17. She briefed the court that Diana did not have a valid cause of action, since her oral contract theory was clearly dead by this point. CP 112. She asked the court for fees under CR 11 for failure to plead a cause of action. CP 113.Although she was able to address modification in general, that does not mean that Otto had adequate time to respond to a CR 60 motion.

Diana relies on *Carpenter v. Elway*, 97 Wash.App. 977, 988 P.2d 1009, 1014 (1999)[1], *Lindgren v. Lindgren*, 58 Wash.App. 588, 595, 794 P.2d 526 (1990), and *Roberson v. Perez*, 123 Wash.App. 320, 96 P.3d 420, 425-26 (2004)[2] for support. Br. Respondent at 9-10.

Diana confuses the facts of *Lindgren* and in *Carpenter* with the facts of this one. Those courts held that notice was properly given because the opposing party responded *to the motion* ("The length and thoroughness of his memorandum filed in opposition to the motion indicated that he had ample

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[1] Diana cites the page for the regional reporter, not the official state reporter. Accordingly, Otto follows this method for *Carpenter* and *Roberson*.
[2] See footnote immediately above.

time." *Lindgren* at 593; "Carpenter submitted a thorough response to Elway's motion..." *Carpenter* at 1014; *see also Carpenter* at 1012). In this case, Otto and his attorney were not responding to Diana's motion, but complying with a request from the court to prepare a "pocket" brief. Trial RP 85-86.

Diana also cites *Roberson* in support of her argument that Otto received adequate notice. But this case has nothing to do with notice for a motion to vacate, as Diana purports. The *Roberson* court held that a motion to vacate may be decided in a show cause hearing without live testimony. Her attorney failed to conduct a reasonable inquiry that this case even applies.

Since Diana filed her motion on the same day that Otto's attorney filed her pocket brief, and the judge ruled within hours on Diana's motion, it cannot be held that Diana gave adequate notice or that Otto had time to respond. Otto was never able to file an opposing paper until after the matter had already been decided. CP 337-342; *see also* CP 304-333.

Although Otto briefed the court about CR 60(b), there are 11 separate reasons under this section that the court could have considered. There is no way that he could have arrived on the last trial date, written an effective brief on the broad topic of "modification", guessed that Diana would move the court specifically under CR 60(b)(11) and also argued specifically to this subsection with the instructions given.

That is precisely why the notice rules exist: it is impossible to know what to argue against until you have been given notice. The court should not have

given the parties vague instructions if it intended to make a decision on a specific rule.

Even if Otto could guess that the court was considering CR 60(b)(11), that does not excuse Diana from following the procedural requirements of the rule. Diana's failure to follow the procedure laid out in CR 60 was not harmless error, and removed Otto's rights as a homeowner.

Diana continues to take the position, without offering authority, that a violation of the hold harmless agreement is cause for modification of the divorce decree. Br. Respondent at 19, 27, 29, 31. This theory was first put forward in her pocket brief submitted to the court on the last day of trial. CP 261; see also Trial RP 134, 139. The court did not test this theory against any case law, statute, or rule, and adopted her theory without proof. Trial RP 152; CP 345-47. 351, 355.

Diana did not produce any cases where a court allowed such modification of an old divorce decree based upon equity or a violation of the hold harmless agreement. Indeed, neither did Otto, as none could be found. This fact alone would have given pause to a prudent attorney.

"The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Bryant v. Joseph Tree. Inc.,* 119 Wn.2d 210, 220, 829 P.2d 1099 (1992) (citing *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash.App. 106, 111, 780 P.2d 853 (1989))

Thomas Foley persuaded the trial court to broaden the normal and plain meaning of hold harmless agreements as a basis for "extraordinary circumstances" under CR 60(b)(11). Yet, to this Court, did not produce a single rule, statute, or case that supports this theory, even after Otto had challenged it. Br. Appellant at 31, 32. Diana's attorney did not make reasonable inquiry as to the legal basis of his "hold harmless" theory, or why the existing interpretation warrants expansion. CR 11(a)(2).

Thomas Foley has been rebuked before in the WA Court of Appeals for his ungrounded and unwarranted theories (case nos. 50645-5, 51384-2 (consolidated)). Division I held that his filings violated CR 11 and considered its own motion under RAP 18.9(a) to sanction him. CP 455. This Court should hold his statements to a higher standard than the Skamania court seemed to.

C. THE RESPONDENT RAISES ISSUE OF AMBIGUITY OF CR 60, WHERE THERE IS NONE.

Diana also challenges CR 60(e), arguing that the rule is ambiguous as to which cause of action a motion must be filed in. Br. Respondent at 7. She suggests that a motion under CR 60(e) can be made in a cause different than the cause in which the decree is in. In this case, that she may make a motion in Skamania case no. 14-2-00141-1 to affect a change in cause number 08-3-00029-5.

Interpretation of court rules is reviewed de novo. CR 60(e) states in relevant part: "Application shall be made by motion filed in the cause…", with emphasis, in this case, to the words "the" and "cause".

The word "the" is used to define a unique noun, and does not consider multiple nouns, unless they are in a plural class, such as "the people". The word "cause", or "cause of action" as used by Diana (Br. Respondent at 7-8), (which Otto agrees with) is: "3. Loosely, a lawsuit". BLACK'S LAW DICTIONARY 267 (10th ed. 2014); *accord* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 182 (10th ed. 1998) ("cause...2 a: a ground of legal action b: case").

In both authorities, it is singular, not plural. Because CR 60(e)(1) uses "the" to signify a unique noun and the singular "cause" to signify a unique lawsuit, it does not consider that a motion can be filed in another cause.

Diana's assertion that a motion under CR 60(e)(1) can be made in a different cause than the decree being modified is inconsistent with the ordinary meaning of the court rule. If the drafters intended to expand the procedure of CR 60(e) to mean "a cause", they would have written it as: "Application shall be made by motion filed in a cause...". *Compare* CR 4(b)(1)(i), *and* CR 40(a)(1) using "the cause", *with* CR 2A, CR 40(a)(3), CR 40(d), *and* CR 43(j) using "a cause".

If we are to adopt Diana's interpretation, does that mean also that a litigant can modify a Pierce County decree from an action in King County? What about two separate causes in the same county, but with different litigants? No, there must be some limits. Otherwise, the concepts of consolidation and severance are meaningless.

When applying an analysis to the plain language of the relevant phrase, a reasonable person could not conclude that CR 60(e) is ambiguous. Diana was required to file a motion under CR 60 in Skamania cause no. 08-3-00029-5, with notice, and the court was required to set a future hearing for argument. None of these happened, and are grounds for reversal. Her attorney did not make a reasonable inquiry into the legal validity of his statements and does not make a good faith argument why this Court should expand CR 60(e) beyond its plain meaning. CR 11(a)(2); RPC 3.1, cmt. 2.

Diana seems to misapprehend the scope of this Court's authority, arguing that upon reversal, she should be permitted to again bring her CR 60 motion through the correct cause number in Skamania. Br. Respondent at 11-12. She seems to suggest that in the event of a reversal on CR 60(e) grounds, she would once again pursue the exact same outcome by re-filing in the "correct" cause number. *Id.* This tactic violates RAP 12.2, RAP 12.5, is res judicata and likely collaterally estopped.

An appellate decision is binding upon the parties. RAP 12.2; *Hough v. Stockbridge,* 152 Wn. App. 328, 337-38, 216 P.3d 1077 (2009), *review denied,* 168 Wn.2d 1043 (2010). A party cannot make a post-review motion in the trial court to modify an appellate decision. RAP 12.2; *State v. Dorosky*, 28 Wn. App. 128, 132, 622 P.2d 402, review dismissed, 96 Wn.2d 1011 (1981). The trial court cannot decide which parts of the appellate decision to honor and which to disregard. *Deep Water Brewing, LLC v. Fairway Res., Ltd.*, 170 Wn. App. 1, 7, 282 P.3d 146 (2012). Once the appellate court makes enunciates a

principle of law, it will be followed in later litigation. *Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 189-90, 311 P.3d 594 (2013) (footnote omitted) (quoting *State v. Schwab*, 134 Wn. App. 635, 644, 141 P.3d 658 (2006), aff'd, 163 Wn.2d 664 (2008)), review denied, 179 Wn.2d 1027 (2014).

If this Court finds for reversal based on grounds of CR 60(e) procedure violations, it should be clearly communicate to Diana and the Skamania court that relitigation of this matter is intolerable. Her apparent intention to pursue litigation even after a reversal is alarming.

She should also not be allowed the alternate relief she requested, which was for the court to flip the house ownership back to her, essentially reversing the position of the 2008 property disposition. Trial RP 7-8, 37, 94

D. THE RESPONDENT MAKES STATEMENTS UNGROUNDED IN FACT OR RECORD.

In her response, Diana inserts evidence not in the record regarding Thomas Foley's ex parte hearing of February 26, 2016. Br. Respondent at 5. Her explanations are unsupported by any record, are introduced for the first time here, and are self-serving.

An attempted phone call to Otto's lawyer (not conceded) is not adequate notice. Diana's attorney seems to want to find justification with this Court by explaining his actions, but this Court "is not a fact-finding branch of the judicial system of this state." *Clallam Cnty. v. Dry Creek Coal.*, 161 Wn. App. 366, 255 P.3d 709 (2011) citing *Berger Engineering Co. v. Hopkins*, 54 Wn.2d 300, 308, 340 P.2d 777 (1959). If Mr. Foley wanted to defend his ex parte

hearing, he should have requested permission for additional evidence on review (RAP 9.11(a)) or submitted evidence to the trial court and made a good faith effort to supplement the record (RAP 9.6(a)). Neither Otto nor his attorney was notified about the ex parte hearing and it was only stumbled upon during the appellate transcription period, necessitating action in this Court for proper inclusion into the record (*See* COA motions, 9/12/16, 10/5/16).

Her brief makes other ungrounded statements that Otto delayed or refused to fulfill Diana's requests. Br. Respondent at 2-3. The record is clear that Otto offered bank documents for Diana to sign (Ex. 7 at 4, Ex. 13 at 2-3) and later that year, offered to give her back the house (Ex. 7 at 1, Ex. 13 at 2-3). She refused both forms of relief. *Id.*

Diana misstates the facts that "[s]ince 2008 the parties had discussed removing Respondent from the Mortgage", but it is apparent from the record that Diana waited until 2011 to bring any complaints to his attention. Ex. 7, 13; Trial RP 17, 30, 34, 40.

Diana argues that Otto's discovery requests were "oppressive". Br. Respondent at 4. This is untrue, as the trial court denied Otto's proposed interrogatories without good cause. 1/28/16 RP at 21-22. CP 63-79. The Court declared that they were not "reasonable[sic] calculated to get relevant evidence on this breach of contract issue." 1/28/16 RP at 22.

The interrogatories contained questions about Diana's income and employment (CP 74-75), credit (CP 75-78), and property ownership (CP 76). The record and even the court's own statements demonstrate that Otto's

interrogatories rested at the heart of Diana's chief complaint. CP 94, 261, 346, 351 Trial RP 6, 7, 13, 31, 35, 44, 46-47, 49-53, 60, 68-69, 82, 84, 90, 109-110, 147, 148, 152-154, 155. Consequently, Otto walked into trial with no discovery documents at all from Diana. CP 47-49, 50, 64, 89, 90. The court erred by denying his discovery requests and subsequently fining him. 1/28/16 RP at 21-22.

The trial court did not test Diana's ungrounded statements, but instead took her attorney's words for granted. This Court should use the record as its guide and reject Diana's unsupported statements.

E. THE RESPONDENT'S ATTORNEY'S USED QUESTIONABLE METHODS TO ENFORCE THE JUDGMENT.

Around January 13, 2017, the special master released previously unreleased emails that detailed conversations between himself, Thomas Foley, and Rick Shurtliff. CP 494-529. The special master had regular conversations with Thomas Foley and Rick Shurtliff beginning June 3, but waited over two months before responding to Otto's request. CP 370. Otto asked Rick Shurliff multiple times to disclose his email and other communications, which he has refused to do. CP 491, 492.

1. Thomas Foley himself, and not the special master, appointed Rick Shurtliff as the realtor to sell Otto's home.

The day after he entered the judgment, Thomas Foley advises the selling group that Rick Shurtliff is the realtor who was appointed to sell the house (CP 497), despite the order specifying that the special master will choose the realtor. CP 351. The order does not contemplate that Diana's attorney will

choose the realtor. *Id.* From the start, and without Otto's knowledge (until recently), Thomas Foley handpicked Rick Shurtliff to be the "court-appointed" realtor. This possibly violated RPC 3.4(c). The record shows that Diana's attorney exerted a remarkable amount of influence on him; presumably, the realtor was an impartial appointee of the court. CP 360, 361-362, 367-368, 370, 384, 387, 398-399, 400-402, 405, 406, 489-492, 497, 513, 514, 515, 524-525, 527, 528, 537, 538, *Cf.* 391-394.

2. Thomas Foley knew that facts contained in Rick Shurtliff's affidavit supporting a motion for contempt were false and misleading when he submitted it to the court.

Diana filed for contempt on August 9, 2016, asking to lower the price of Otto's home. CP 359. She based this on Rick Shurfliff's affidavit, written on Thomas Foley's pleading paper. CP 361. Mr. Shurtliff declared that he first tried to contact Otto June 7, and finally reached him June 9. *Id.* He claims that Otto has interfered "nonstop", that Otto referred him to his attorney, and that potential buyers have called to walk through the home. *Id.* By inference, the reader is left to believe that he was actively marketing the property.

But, Rick Shurtliff's emails to Thomas Foley show that he made multiple attempts to drive by Otto's home as early as the weekend of June 4-5, when Otto was out of town. CP 503. Rick Shurtliff documents a meeting on June 6 with Otto and says that the house is in good condition and that Otto showed him through the house. CP 499. This is in contrast with what he and Thomas Foley represented to the court, describing the first contact attempt on July 7, which is safely beyond the automatic stay provided by CR 62. Rick Shurtliff

describes several meetings with Otto where they discussed the sale of the home. CP 499, 502, 519. By contrast, Mr. Shurtliff did not advise the court that he had meetings with Otto. Otto objected to his statements on August 22. CP 364-367.

Mr. Shurtliff told Thomas Foley and the special master that he installed a for sale sign on Otto's home on June 6, 2016 (CP 499-501), predating the date he represented to the court that he even contacted Otto (July 7, 2016). Since the judgment was signed June 2, 2016, there was a stay in place for 14 days that he and Thomas Foley failed to observe. CR 62. The soonest he would have been able to start enforcement was June 17, 2016 since there was already a notice of appeal. CP 304. This was a violation of CR 62.

Rick Shurtliff tells the selling group that Otto agrees to a June 13 meeting with him to discuss the home sale. CP 502. He describes the meeting, and acknowledges that Otto agreed to prepare his home for sale and that they agreed to a meeting on June 20 so that Otto can hand the key over. CP 519. He makes no mention of any "interference", and reports that Otto was "very congenial" and "very willing" to prepare his home for sale. *Id.* In contrast, his declaration represents that Otto "interfered nonstop", "prevented [him] from showing" the home, and "Mr. Guardado's behavior is the only thing preventing me from selling the property." CP 361-2.

Public records show that Rick Shurtliff never even listed the house for public sale at all. CP 421, 426 (9/14/2016 report shows "no listing history" in last 3 years), 441 (report shows that house was listed for sale by Mark Taylor

on 1/5/2017), 445 (report shows that house was listed for sale in 2007, sold to Mark Taylor on 11/18/16, and placed on sale 1/5/2017). *Cf.* CP 366-367. But during the contempt hearing, Thomas Foley represented to the court that the house *was* listed for sale at $289,000. 8/25/16 RP at 2.

Not only did Rick Shurtliff not list the home for sale, but represented to the court that he had to turn away potential buyers due to Otto's alleged resistance (not conceded). CP 361, 366-367. Mr. Shurtliff declared that the house was worth $289,000, but he did not prepare any valuation report, market analysis, or appraisal for Otto's property, or submit one to the court. CP 401. He appeared to speculate on the value based on no data whatsoever. *Cf.* CP 366-367. The court took his word for it, without any proof.

The internal communications between he and Thomas Foley never mention a single conventional prospect from June 5 – August 25, the day of the court order to discount Otto's property. CP 494-529. Their emails only discuss seeking out and selling to a private cash buyer only. *Id.* Otto stated that Rick Shurtliff never approached him even once with a potential buyer for his property during the 2 ½ months that he was supposedly marketing the property. CP 367.

"The court...should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted." *Bryant*, 119 Wn.2d at 220. Because Thomas Foley was regularly emailing Rick Shurtliff and knew the facts, he could not have possibly believed that the affidavit he submitted to the court was true.

Thomas Foley and Rick Shurtliff never listed Otto's property for sale to the general public, but instead sold it to Mark and Michelle Taylor at a discount price. Thomas Foley knowingly submitted a false affidavit with the purpose of persuading the court to lower the price of Otto's home. CR 11(a)(1). RPC 3.3(a)(4). The court relied only on this affidavit and Mr. Foley's statements when it made the decision to lower the price of Otto's home to $240,000 for the cash buyer. 8/25/16 RP at 1-2, 8. This may constitute fraud that justifies the voiding of the sales contract.

3. The selling group deliberately ignored Otto's request to contact his attorney, Josephine Townsend.

Rick Shurtliff advises the group that he spoke to Otto on July 9 and Otto asked him to contact his attorney. CP 524-25. Thomas Foley knew that Otto was represented at the time by attorney Josie Townsend, and the special master advised Rick to proceed with the sale. CP 362, 491, 524-525. The selling group made no attempt to communicate with her, despite sharing her phone number among themselves. *Id.* Diana's attorney instead contemplated obtaining more restrictive methods to coerce the sale of Otto' home and did not make a reasonable inquiry with Otto's attorney. CP 524. RPC 4.2, cmt 3. *See also Engstrom v. Goodman*, 166 Wash.App. 905, 914, 271 P.3d 959 (2012).

4. Thomas Foley submitted another declaration that was ungrounded in any fact, and poorly researched.

During the November contempt hearing, Thomas Foley's assistant handed Rick Shurtliff's second affidavit to Otto, which is entirely hearsay, and generally false and malicious. CP 398-399, 401-402, 405, 406. Because Otto

was in the hearing itself before receiving it (CP 400-401), he had no choice but to make a post-hearing response and objection to the affidavit. CP 400-404. Two other witnesses controverted almost every point that Rick Shurtliff made, including Mark Taylor himself. CP 405, 406. Thomas Foley based his arguments on Mr. Shurliff's ungrounded affidavit and failed to make a reasonable inquiry into the validity of his statements. CR 11(a)(1).

Since the home sale had already occurred several hours before the hearing even started, the matter of contempt for Otto's alleged interference was moot. CP 402, 532, 533. Diana's attorney repeatedly pushed the court to find Otto in contempt and incarcerate him, despite the knowledge that the home sale had already occurred. *Id. See also* RPC 3.1.

During this hearing, the court improperly modified an order that was currently under review. The trial court is not allowed to modify an order under appellate review without permission from the Court of Appeals. RAP 7.2.

5. Other irregularities

Thomas Foley was advised that the sale price of $240,000 was inadequate to cover the obligations and other judgments on the house. CP 513, 514, 515. Despite this, and despite the order calling to realize as much equity in the house as possible (CP 351), he did not consider any alternate course of action than quickly selling the house. CP 515. Thomas Foley said he was unconcerned about anyone "downstream" or anybody else's judgment but Diana's. *Id.* He focused on compensation for the selling group and no one else. *Id.*

The subject of special masters in Washington is somewhat thin, but it is clear that they are an adjudicative officer. RPC 1.12, cmt 1, RPC 7.6, cmt 3. If Diana had grievances with Otto's alleged contempt (not conceded), she should have first gone to the special master for relief, but did not. CP 370. The special master should have served as the go between for the parties, but clearly did nothing but further remove Otto from the selling process – the special master even signed a waiver of Otto's rights to legal counsel. CP 485. This raises the question of why a special master was appointed at all, but for appearance's sake only, since Otto was perfectly capable of signing paperwork himself.

The special master also ordered that the Rick Shurtliff disclose to potential buyers all the post-judgment documents. CP 407. Rick Shurtliff refused to do this, and defiantly told Otto that he was "not responsible to answer to [Otto]". CP 408, 409. When Otto asked the special master to enforce his own order, he refused. CP 409. Accordingly, Otto had to record a lis pendens to preserve his rights.

These situations demonstrate why courts should exert boundaries on litigants: Diana's attorney himself suggested Vern McCray as special master (Trial RP at 140), appointed Rick Shurtliff himself, had private conversations with them outside the knowledge of Otto or the court, submitted two of Rick Shurtliff's unflattering and false affidavits to the court, and generally directed him throughout the buying process. There was no way that Otto was able to get fair treatment from the selling group, since they were clearly in Thomas Foley's orbit, and raises issues of unjust enrichment.

F. THE BUYER OF THE APPELLANT'S PROPERTY WAS NOT A BUYER IN GOOD FAITH.

Otto recorded a lis pendens on October 10, 2016. CP 459-61. Otto's home was sold in a private, non-execution sale to a cash buyer for a price fixed by the trial court at $240,000, disturbing the status quo. CP 486. Recent value reports suggest a purchase price of $325,377. App. A, tbl. 1. The new owners, Mark and Michelle Taylor, with the special master, signed closing documents and title insurance documents despite Otto's absence and objections. CP 402-4, 465-488, 489-492, 533.

The new buyer reached out to Otto prior to purchase to learn more about the pending legal action. (Audio CD of voicemail filed with COA 12/9/16), CP 462-3 (Taylor phone log)[3]; the buyer had extensive conversations with Otto and possessed sufficient knowledge about the legal action. CP 399 (Shurliff affidavit (controverted by Otto)), CP 405 (Mark Taylor affidavit), CP 406 (Rainey affidavit); the buyer was given notice of the lis pendens, original complaint, trial court order selling home, and Otto's first appellant's brief, plus other documents and info. CP 457-8. Sale documents indicate that both buyers initialed next to the lis pendens notice on the ALTA (American Land Title Association) commitment title insurance report. CP 469. The deed was recorded before any release of lis pendens was recorded. CP 464. Otto only signed a release under duress and pain of contempt from Diana's attorney. Diana's attorney argues that the release was delivered to him "in escrow" (See

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[3] Clerk's papers reproduced poorly on Appellant's copy from Skamania County.

Respondent's Response at 2, 4 (12/12/16)) but he is not a qualified, impartial escrow agent and cannot hold documents in escrow. He did not file the original document, but one that was electronically transmitted to him, and did not include an affidavit with the removal form saying it was electronically transmitted.

RAP 12.8 provides remedies available to the appellate court in the cases where a trial court decision is modified. A "purchaser in good faith" is not affected by a modification.

"Case law defines "good faith purchaser for value" as one "who is without actual or constructive notice of another's interest in the property purchased." *United Savings and Loan Bank v. Pallis*, 107 Wash.App. 398, 407-408, 27 P.3d 629 (2001). (Quoting *Tomlinson v. Clarke,* 118 Wash.2d 498, 500, 825 P.2d 706 (1992).

A person who has constructive notice of a legal claim is not a purchaser in good faith. *United Sav. and Ln.,* 107 Wash.App. 398 at 408:

> "It is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be held chargeable with knowledge thereof and will not be heard to say that he did not actually know of them. In other words, knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed." (Quoting *Miebach v. Colasurdo*, 102 Wash.2d 170, 175-76, 685 P.2d 1074 (1984).

Here, significant evidence exists that the buyer had extensive and intimate knowledge of Otto's legal claim on the property: there is the filed lis pendens (CP 403, 406, 457, 459-61, 469), a voicemail that Mr. Taylor left Otto asking about the house, evidence of Mr. Taylor calling Otto before purchase (CP 462-3), an email that Otto sent him (CP 457-8), his initials next to the lis pendens entry on the title report (CP 469), plus his own affidavit confirming multiple conversations before purchase. CP 405. The lis pendens was in effect during the whole closing process. CP 464. In his voicemail, Mr. Taylor says he saw an opportunity to purchase a house through his real estate agent. In fact, the price was so absurdly low, that it spurred him to seek out additional information by contacting Otto first. There is no doubt that he had constructive notice and was therefore not a "purchase in good faith" as contemplated by RAP 12.8.

This was not a sale where the highest price was sought, such as an execution sale. This sale was conducted by a special master requested by Thomas Foley. Thomas Foley selected realtor Rick Shurtliff who never listed the home for public sale or created a market report to assess the value of the property, but instead identified a cash buyer (Taylor) to purchase the home at a discount of about $85,000 under fair market value (-26% below FMV). Since the realtor did not market the house at its fair market value, there is even less merit to the argument that there was a bona fide purchaser. "...[T]he policy of promoting the highest prices at execution sales that is the rationale for the rule protecting third parties who, in good faith, purchase at execution sales upon a

judgment subsequently reversed, is absent here." *United Sav. and Ln.*, 107 Wash.App. 398 at 410. Otto objected to the fixed price to the Skamania Superior Court, which is lower than that normally associated with foreclosure properties (-20%), which this clearly was not.

As of this writing, Mark and Michelle Taylor still are the owners of this property. A public lis pendens recorded under Clark County Auditor Documents currently alerts any potential buyer of this pending action: http://gis.clark.wa.gov/gishome/Property/?pid=findSN&account=118141052 (last visited February 21, 2017). Further, it informs any subsequent buyer of this Court's ruling of December 14, 2016 that this case was not moot.

Diana argues the loss of Otto's home was "mere inconvenience". Br. Respondent at 14. Thomas Foley acknowledges that there was about $207,000 owing on the house. CP 515. See also CP 486 (line 504, showing $208,507.19). At the time of sale, the house was worth about $325,377. App. A, tbl. 1. In all, Otto had about $116,870 in equity in the house, which evaporated with the discounted sale price and the closing costs that came from the proceeds.

Less than three weeks after Otto moved out, Mark Taylor put the house up for sale for $325,000 (CP 437, 441), a profit of about $85,000, since the special master paid for every closing cost item from the equity of Otto's home. App. A, tbl 2. As of this writing, the home had not yet been re-sold, according to public records.

In addition to paying all closing costs of $6,740.98, Otto also had to pay Rick Shurtliff and/or his associates at Realty Pro $10,000 sales commission (CP 487), $1,200 to Vern McCray[4] (CP 526) for services as special master, and $16,171.46 attorney fees to Diana[5] (CP 350). App. A, tbl. 2.

Despite having equity of over $116,000.00 in the home at time of sale, Otto received $0.00 after the special master covered expenses for Thomas Foley, Rick Shurtliff, and himself.

Additionally, Otto incurred costs to move his family from their primary residence and into another home. He lost on any future gain in value of the house (the equity gained significantly after 2104). Ex.13 at 6. And of course, his family suffered a loss in social capital, and loss of the use of their own property. He also was forced to downsize and utilize a storage unit for his household belongings, and move his children farther from work and school. This does not account for all the time, energy, and money associated with fighting the decision in the trial and appellate court.

No reasonable person would conclude that Otto's forfeit of $116,000 and his family's other losses were "mere inconvenience", as Diana argues. Br. Respondent at 14. Diana's argument is as insulting as it is wrong. Even Mark

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[4] Vern McCray charged Otto an additional $150 beyond the price he quoted to Rick Shurtliff.
[5] Because there was a negative amount of $2,619.63, Otto assumes that Diana's attorney absorbed the difference ("So, he's [i.e. Otto] abusing the system, he's forcing my client to spend money she doesn't have in an attempt to, you know, and I'm not leaving, I'm not quitting, I'm not going away. Even if my client can[sic] afford to pay me, I'm gonna see this thing through." 1/28/16 RP at 6).

Taylor, who benefited from the substantial home discount, acknowledged how unfair it was. CP 539.

G. THE RESPONDENT MAKES INAPPROPRIATE ALLEGATIONS THAT THIS COURT SHOULD DISABUSE.

Diana claims that Otto "harassed" and "threatened" her to sign the quit claim deed. Br. Respondent at 32-33. These are reckless and serious allegations based off her inflated statements that Otto called "like million times [sic]" and that Otto or his former lawyer (in 2011, Juliet Laycoe, Vancouver, WA) "threaten[ed]" her. Trial RP at 64, 68. Otto denies these allegations. The actions she testified to do not fit the definition of "threat" (RCW 9A.04.110) or "harassment" (RCW 9A.46.020).

Even if we are to take her accusations as a kind of character denunciation rather than true allegations of criminality, she should not be making these kinds of casual, inappropriate allegations in this public forum, as they have the potential to be taken out of context and used in harmful ways against him in the future.

This is not idle conspiratorial fear: Diana exposed Otto's recent divorce decree to the trial court in an unflattering light. Trial RP at 110-115. Otto strongly challenged the findings (*Id.* at 111-114), and objected three times to their use (*Id.* at 110-112). The trial court admitted them anyway. Otto has another acrimonious appellate case pending and does not want her wanton statements to haunt future litigation or cause unforeseen social effects.

Accordingly, he asks that this Court clearly state to future readers that Diana's allegations are ungrounded, inappropriate, and without merit.

Diana also alleges that Otto made false statements (not conceded; Br. Respondent at 1), but never identifies what statements are allegedly false. Otto cannot appropriately respond to this because it lacks specificity. Her allegation is ungrounded and unsupported by any evidence in the record, and should not be considered. *Lemond v. Dep't of Licensing,* 143 Wn. App. 797, 807, 180 P.3d 829 (2008).

H. ATTORNEY FEES

Diana states that her attorney fees were submitted "in open court", not in camera, but cannot explain why the record is absent of this alleged fact or why the clerk did not file a copy. Br. Respondent at 25. The hearing started at 1:31:17 PM and after hearing argument from both sides, announced at 1:32:58 PM that he has read the fees "line by line". CP 378; 6/2/16 RP at 3. It's implausible that the court could have received the cost bill, listened to argument from both parties, and conducted a fee analysis in about 1 ½ minutes.

Diana asks for attorney fees based on the equitable grounds that the trial court cited, RAP 14.3 and RAP 18.1. Br. Respondent at 33. The trial court awarded attorney fees because of "bad faith" and other reasons (none conceded). CP 348. Diana does not demonstrate that Otto engaged in any bad faith during review, and did not cite any laws justifying an award of fees on review or other reasons in equity. Accordingly, her request should be denied.

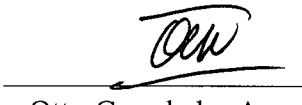
II. CONCLUSION

The trial court was not justified in modifying an eight-year-old divorce decree, and this Court should reverse that decision. By allowing litigants to modify stale decrees, the courts invite any disaffected spouse from the past to resurrect their grievances because of outcomes they did not foresee.

Diana's attorney's "win at all costs" gamesmanship compounded the errors that the trial court committed, and introduced new complications. He exerted influence on court appointees to expedite the sale of Otto's home, made misrepresentations to the court, and violated rules that exist to protect litigants. This Court should not only grant the relief Otto asked for in his opening brief, but put an end to Diana's malicious litigiousness in no uncertain terms.

Because the buyer of the home was not a buyer in good faith, this Court should reinstate Otto's property rights and also consider if the home transaction should be voided due to Rick Shurtliff's false affidavits and the questionable conduct of Thomas Foley.

Respectfully submitted February 21, 2017,



Otto Guardado, Appellant

INDEX TO APPENDIX: REPLY BRIEF OF APPELLANT

Guardado v Guardado

Court of Appeals, Division Two, No. 48903-1-II

Number	**Description**
A	Table 1- *Valuation reports, 10007 NE 28th Ave, Vancouver, WA*
	Table 2 - *Otto's closing costs*

TABLE 1 – Valuation reports, 10007 NE 28th Ave, Vancouver, WA

Source	Price	Record location	As of date:
Zillow.com	$328,510	CP 410	11/18/2016
Realtor.com	$332,621	CP 418	11/18/2016
Vanessa Wagner, Vancouver, WA 360-609-7423	$315,000	CP 424, 425, 427	9/14/2016
Rick Shurtliff, Vancouver, WA 360-518-1122	No report	No record	n/a
Average price	**$325,377**		

TABLE B – Otto's closing costs

Source	Proceeds	Fees	Record location	Line
Cash sale	$240,000.00		CP 486	401
Home payoff to Bayview Mort.		($208,507.19)	CP 486	504
County Property Taxes		($413.86)	CP 486	408
Commission to real estate agent		($10,000.00)	CP 487	700, 701
Title closing costs		($514.90)	CP 487	1101
Title insurance		($1,035.22)	CP 487	1108
Excise tax		($4,277.00)	CP 487	1301
Sewer hold		($500.00)	CP 487	1302
Fees, special master		($1,200.00)	CP 526	n/a
Attorney fees to Diana		($16,171.46)	CP 350	n/a
Total		**($2,619.63)**		

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DIANA GUARDADO Respondent v. OTTO GUARDADO Appellant	Skamania No. 14-2-00141-1 COA No. 48903-1-II CERTIFICATE OF SERVICE

I Certify under penalty of perjury in accordance with the laws of the State of Washington that I served Respondent, through her attorney, Thomas Foley, by USPS, postage paid to:

1111 Broadway St
Vancouver WA 98660

this Certificate and the following on the date below:

Reply Brief of Appellant (copy)

Dated February 21, 2017 at Vancouver, WA,

Otto Guardado
800 NW 75th St
Vancouver, WA 98665
360-713-2448

Tue 2/21/2017
12:42 PM

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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I Certify under penalty of perjury in accordance with the laws of the State of Washington that I sent to:

Court of Appeals, Div II
950 Broadway St
Tacoma, WA 98402

the following on the date below:

Reply Brief of Appellant (original)
Certificate of Service [to Thomas Foley] (original)

And copy of this Certificate to Thomas Foley at thomasfoleypc@hotmail.com on the date below,

Dated February 21, 2017 at Vancouver, WA,

Otto Guardado
800 NW 75th St.
Vancouver, WA 98665
360-713-2448

Enclosure: Appendix, Package tracking number

Appendix

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